STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2003
V	No. 240347 Ingham Circuit Court
MIGUEL MARTI, Defendant-Appellant.	LC No. 01-077401-FC

Before: Meter, P.J., Talbot, and Borrello, J.J.

PER CURIAM.

Defendant Miguel Marti appeals as of right from a conviction of two counts of first degree murder, MCL 750.316a, following a jury trial. Defendant was sentenced to life in prison without parole. We affirm.

I

This case arose after the bodies of Rene Rodriguez and Ramiro Rios Jr. were found in the basement of known drug trafficker, Robert Sandoval Jr. Before the murders, the victims were assisting Sandoval in distributing a shipment of marijuana.

At that time, both defendant and Sandoval were romantically involved with Tammy Varona. Varona obtained five pounds of marijuana, worth approximately $4,000, from Sandoval and gave it to defendant without any prepayment. At some point, defendant and Varona argued about the money owed to Sandoval, and defendant admitted to Varona that he had been following Sandoval and that he had discovered that Sandoval had another girlfriend. Defendant also uttered threats against Sandoval. Varona became concerned, and she gave Sandoval two guns to protect himself.

The victims and Sandoval distributed most of the marijuana shipment and brought fifty pounds of it to Sandoval's residence, where the victims were staying. Sandoval bought a TV and VCR for the victims. Sandoval left the victims at his home and drove to Varona's residence. A witness later heard two gunshots coming from Sandoval's home. Sandoval later returned to find his home ransacked, and the victim's bodies were found in the basement. Sandoval noted that the marijuana, TV, VCR, and a gun given to him by Varona were all missing. Shortly thereafter, defendant was arrested, and he was tried for the murders with co-defendants Isilio Ramirez, Idileidys Pojular-Granda, and Vladimir Manso-Zamora.

Defendant and co-defendants were all Cuban nationals who spoke little English. They appeared before the court with interpreters and court-appointed attorneys. Defendant expressed dissatisfaction with his court-appointed attorney, who asked to be relieved of his responsibilities. Ultimately, the court directed defendant's counsel to continue representation.

Co-defendants Ramirez, Pojular-Granda, and Manso-Zamora were acquitted of their charges. Defendant now appeals his convictions.

II

Defendant first argues the trial court erred by allowing the testimony of an incompetent witness into evidence at trial. This Court reviews a trial court's determination regarding the competency of a witness for an abuse of discretion. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

During a preliminary examination, the witness at issue, Varona, testified that sometime before the murders, defendant had told her he had "shot up [Sandoval's] truck and that he was going to get [the victims] next." Varona similarly testified at the preliminary examination that after the murders, defendant said to her, "I told you that I was going to do it and I did it."

At trial, Varona expressed difficulty remembering specific dates and the sequence of events leading up to and after the murders due to her habitual marijuana and cocaine use. Repeatedly, she stated that she did not "remember the ways things happened," and that she didn't "remember the sequence of things." But after being asked at trial whether she was truthful during the preliminary examination, she answered, "I believe so."

Defendant now contends the trial court erred by allowing Varona to testify. Defendant argues Varona was not a competent witness due to her habitual drug use and inability to remember the events surrounding the murders. But defendant never objected to Varona's competency as a witness. Although defendant suggested that the court declare Varona unavailable and read her preliminary testimony into the record, defendant failed to properly preserve the issue of Varona's competency for our review. Defendant's failure to object to the admission of Varona's testimony on the basis of incompetence waived his right to assert error regarding this issue on appeal. *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981).

And MRE 601, which provides the general rule regarding witness competency, states:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Therefore, the trial court was required to assume Varona was competent to testify, and only if the court concluded she lacked the capacity or obligation to state the truth while under oath did she become incompetent. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). Varona's habitual drug use and consequent memory failure were indicative of her credibility, but not necessarily her ability to testify truthfully and understandably. After our

review of the record, we conclude the trial court did not abuse its discretion by admitting Varona's testimony.

III

Defendant next argues the prosecution presented legally insufficient evidence to support his convictions for first-degree murder. We disagree.

> The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt . . . . The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. [*People v Nowack*, 462 Mich 392, 399; 614 NW2d 78(2000).]

"The elements of murder are (1) the killing of a human being (2) with the intent to kill, or to do great bodily harm, or with willful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm." *People v Johnson* (On Reh), 208 Mich App 137, 140; 526 NW2d 617 (1994). We find the prosecution presented sufficient evidence of the elements of murder.

Defendant had made threats against the victims' "boss," Sandoval, and he had been following Sandoval. Bullets found at the crime scene recovered from one of the victims' bodies were fired from a gun found in defendant's possession. A TV and VCR were also found in defendant's possession, and their serial numbers matched paperwork regarding Sandoval's stolen TV and VCR. Further, Varona testified that defendant told her he had committed the murders. Although the prosecution was unable to present direct proof of defendant's guilt, circumstantial evidence and reasonable inferences drawn from it can constitute satisfactory proof of a crime's elements. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Also, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of murder were proven beyond a reasonable doubt. See *Nowack, supra* at 399. We therefore find no error regarding this issue.

IV

Next, defendant contends he was denied a fair trial when the jury observed him wearing prison shackles as he was removed from the court by department of corrections officers. We disagree.

We have long recognized the freedom from shackling as an important component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Shackling during trial is permitted only in extraordinary circumstances to prevent the defendant's escape, to prevent the defendant from injuring others, or to maintain an orderly trial. *Id*. at 425. However,

the decision to shackle a defendant is within the trial court's discretion, and we review the trial court's decision for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 522 NW2d 663 (1996). To justify reversal on the basis of being shackled, defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

We first find the trial court did not abuse its discretion in deciding to shackle defendant. When the instant case began, defendant had served six months of a six-and-a-half to ten year sentence for assault with intent to do great bodily harm. During that time, he had accrued four major conduct violations. The court did not abuse its discretion in deciding defendant was both a flight risk and a dangerous individual. Furthermore, we note the trial court's decision was in agreement with defendant's stated preference for shackles instead of numerous uniformed deputies.

Next, we conclude the court did not abuse its discretion in denying a mistrial after defendant's shackles were exposed to the jury while he was removed from the courtroom. Defendant was removed from the courtroom during jury voir dire after he, through his interpreter, repeatedly expressed dissatisfaction with his attorney and requested to return to jail. Shortly before his removal, the entire prospective jury panel had been seated. According to the lower court record, defendant

> raised his hand and stood up and wouldn't sit down after being instructed to by the Court, and he said that he didn't want to be here, and he wanted to go back to the jail. And the Court, rather than further make a scene in front of the jury, [] had him removed from the courtroom.
>
> Immediately after defendant was removed, his counsel requested a mistrial.

However, the lower court record reveals no basis for relief. Generally, a defendant "cannot claim the benefit of error that he himself occasioned." *People v Henley*, 2 Mich App 54, 58; 138 NW2d 505 (1965), rev'd on other grounds 382 Mich 143 (1969). In this case, defendant was removed from the courtroom after he made a request to return to jail in front of the prospective jury panel. The trial judge repeatedly asked defendant to sit down and direct his questions only to his attorney, but defendant refused. The trial judge had defendant removed from the courtroom only to avoid aggravating the situation in the jury's presence.

We find this case similar to *People v Herndon*, 98 Mich App 668, 673; ___ NW2d ___ (1980), in which this Court stated:

> Although evidence in the record indicates that defendant may have been in the presence of the jury while in handcuffs, there is no evidence that would indicate that any member of the jury ever saw handcuffs on defendant. Further, defense counsel did not request an evidentiary hearing to inquire as to whether members of the jury saw shackles on defendant and, if they did, whether they were thereby prejudiced. See, *People v Panko*, [34 Mich App 297; 191 NW2d 75 (1971)] . . . . In the absence of such an evidentiary record we are unable to hold that defendant was denied his right to a fair and impartial jury.

As in *Herndon, supra*, there is no evidence on the record indicating that any juror who actually deliberated on the instant case saw defendant in shackles. Although the court did not issue a curative instruction to the prospective jury panel, it was not requested by defendant. And absent such a request, the trial judge has no "duty to give any unrequested cautionary instruction to the jury regarding any encounter they may have had with defendant while he was in [shackles]." *Herndon, supra* at 673. Therefore, we conclude the trial court did not abuse its discretion in denying defendant's motion for mistrial.

V

Defendant next argues the trial court violated his right to a trial by a fair and impartial jury by excusing four prospective jurors for cause who did not meet the criteria of MCR 2.511(D). We disagree.

We first note defendant waived his right to object to voir dire errors by expressing satisfaction with the impaneled jury. See *People v Rose*, 268 Mich 529, 531; 256 NW2d 536 (1934). We nonetheless briefly address this issue due to the unusual circumstances of the instant case.[1]

After a juror's ability to serve is challenged, the trial court is required to excuse any prospective juror who is shown to fit one of the categories enumerated in MCR 2.511(D)(4)-(13). *Poet v Travers City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989). "The decision to grant or deny a challenge for cause is within the sound discretion of the trial court." *Id*. Nonetheless,

> where a venire person has expressed a strong opinion, yet has resolved that she can be impartial, . . . the trial court's discretionary function should be balanced against its obligation to fulfill each litigant's right to a fair trial. By achieving this balance in each case, the act of a trial judge in granting or denying a request to remove a potential juror should represent a decision ever mindful of the constitutional seriousness involved. [*Id*. at 237.]

In the instant case, defendant essentially contends the trial court erred by excusing unbiased jurors. The first juror excused, Beck, was a teacher, who stated that his job was his "life," and that if he was unable to teach the last four weeks of the semester he would be concerned and consequently not "100 percent focused" on the instant case. The next excused juror, Sonnenberg, was excused for cause after she indicated a lengthy trial may delay her college graduation. Another excused juror, Schroeder, indicated that she would hold the actors in the trial to her standards based on biblical principles as opposed to secular law. When asked whether she would be able to follow a trial court instruction regarding how a witness's credibility should be decided, she answered, "It would be very hard for me not to take into consideration my bible principles." Finally, the court excused prospective juror Hahn from serving after he expressed concern that he would be unable to avoid using his understanding of

[1] In the instant case, defendant, who communicated to the court through a translator, refused to communicate with his court-appointed attorney.

the Spanish language to make determinations regarding the instant case. He indicated that he would find it difficult to ignore any translation discrepancies. Also, Hahn questioned the meaning of "reasonable doubt," and after being given a definition by the court, he stated, "There are factors in this case involving who the Defendants are that could provide circumstances that would maybe increase or decrease the amount of doubt that I would determine to be reasonable."

Generally, this Court must "defer to the trial court's ability to better assess whether from a juror's demeanor, he or she would be impartial." *Butler v Detroit Auto Inter-Insurance Exchange*, 121 Mich App 727, 746; 329 NW2d 781; (1982). Further,

> a trial judge's exercise of discretion in ruling on challenges for cause should be made with regard for both the parties and their respective claims. When balancing discretionary power with a litigant's right to a fair trial, a trial judge should, in cases where apprehension is reasonable, err on the side of the moving party . . . . Apprehension is "reasonable" when a venire person, either in answer to a question posed on voir dire or upon his own initiative, affirmatively articulates a particularly biased opinion which may have a direct effect upon the person's ability to render an unaffected decision. [*Poet*, *supra* at 238.]

We conclude that because prospective jurors Beck, Sonnenberg, Schroeder, and Hahn articulated opinions that may have had a direct effect on their abilities to render an unaffected decision, the trial court did not err by excusing them for cause at the prosecution's request.

VI

Defendant next suggests the trial court erred by admitting Varona's prior consistent statement under MRE 801(d)(1)(B). We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Under 801(d)(1)(B), a witness's prior statement is not hearsay if when he testifies at the proceeding, he is subject to cross-examination concerning the statement, the statement is consistent with his testimony, and the statement is offered to rebut a charge of recent fabrication, improper influence or motive. Here, defense suggested during cross-examination that Varona's testimony was a recent fabrication. However, Varona's prior consistent statement was made during a second police interview, which occurred before the motive to fabricate arose. Therefore, the court did not err in admitting Varona's out of court statement.

VII

Finally, defendant contends the trial court erred by declaring Christopher Bommarito as an expert witness in metals composition and allowing him to testify that gold varnish on one of the murder weapons was not applied during the manufacturing process. We disagree.

It is within the trial court's discretion to determine the qualification of an expert witness and the admissibility of his testimony. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). During trial, Varona's son, Anthony Thorpe, testified that a gun defendant had

previously shown him had gold medallions on its handle. But the murder weapon shown to Thorpe during the trial had silver medallions. Bommarito testified that on top of those silver medallions were microscopic specks of a clear golden film. Bommarito also opined that the manufacturer did not apply the gold film.

On appeal, defendant challenges Bommarito's testimony regarding the manufacturing process. Specifically, defendant argues that no foundation had been laid to declare Bommarito an expert in the manufacturing process and that he was therefore not able to testify that the manufacturer applied the gold film.

However, we find defendant's convictions unrelated to when the gold film was applied to the medallions. Rather, we find it significant that Bommarito testified that the silver medallions were at one time gold – testimony which defendant does not dispute. We therefore find no error regarding this issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L Borrello